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No. 351

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

THE BROWN PAPER MILL COMPANY, INC.,
*Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 8, 1958

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case May 8, 1958.

### CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 255 F.(2d), 77. It is printed in the appendix hereto at p. 1a.

The opinion of the Tax Court is reported at 23 T. C. 47. The findings of fact and opinion of the Tax

Court appear in the Court of Appeals record pp. 16-158.

## JURISDICTION

The judgment of the Court of Appeals was entered May 8, 1958. Petition for Rehearing was denied by the Court of Appeals on June 11, 1958.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254.

## QUESTIONS PRESENTED

In this case the taxpayer sought excess profits tax relief under § 722 Internal Revenue Code of 1939. The questions for decision are:

(1) Does the Court of Appeals have power to review the decision of the Tax Court in a case arising under § 722, Internal Revenue Code of 1939, where the Tax Court made adverse ultimate findings contrary to favorable detailed evidentiary findings?

(2) Does the Court of Appeals have power to review the decision of the Tax Court in a case arising under § 722, Internal Revenue Code of 1939, where the Tax Court reached certain conclusions without making findings of fact in support thereof?

(3) Does the Court of Appeals have power to review the decision of the Tax Court in a case arising under § 722, Internal Revenue Code of 1939, where the Tax Court held claims for relief were untimely or inadequately presented?

(4) Was § 732(c), Internal Revenue Code of 1939, which denies appellate review of cases where the determination of any question is necessary "solely" because of § 722, repealed by the Internal Revenue Code of 1954?

## STATUTES INVOLVED

The statutes involved are set forth in the appendix hereto pages 18a to 23a.

## STATEMENT

The facts in the case at bar dealing with the issues here involved were stated by the Court of Appeals as follows:

"The Brown Paper Mill Co., herein called the taxpayer, manufactures and sells kraft paper and board. The taxpayer was incorporated in 1929. It and its predecessor corporation have been in operation since 1923.

"The present controversy concerns the taxpayer's Federal excess profits taxes for the years 1940 through 1945. It filed claims for refund of income taxes overpaid for the years 1942 through 1945. It also filed applications for relief from and refund of excess profits taxes paid for the years 1940-1945. The Commissioner of Internal Revenue disallowed the application for relief and refund and determined that certain income and excess profits tax deficiencies existed with respect to the years in question. Thereupon, the taxpayer instituted proceedings in the Tax Court. The latter passed upon various issues, some pertaining to excess profits tax relief and some relating to other matters. Some of the issues were resolved in favor of the taxpayer and some in favor of the Commissioner, as reflected in its opinion and decision. *The Brown Paper Mill Co.* v. *Commissioner of Internal Revenue*, 23 T. C. 47.

"Pursuant to the provisions of Sections 7482, 7483, and 7851(a)(6)(c) of the Internal Revenue Code of 1954, 26 U. S. C. A. (I. R. C. 1954) §§ 7482, 7483,

7851(a)(6)(C), the taxpayer sought review in this Court of the Tax Court's decision. The Commissioner moved to dismiss, asserting that under Section 732(c) of the Internal Revenue Code of 1939, 26 U. S. C. A. (I. R. C. 1939), § 732(c), we cannot review the Tax Court's determinations of the issues here presented. The motion and the argument on the merits were heard together.

"The taxpayer raises several questions, all of which pertain to excess profits tax relief sought by it under the provisions of Section 722 of the Internal Revenue Code of 1939, 26 U. S. C. A. (I. R. C. 1939), § 722, and denied by the Commissioner and the Tax Court. The taxpayer urges a reversal on the grounds (a) that the Tax Court made adverse ultimate findings contrary to favorable detailed evidentiary findings; (b) that the Tax Court reached certain conclusions without there being any findings of fact in support thereof; and (c) that the Tax Court determined that certain theories of relief could not be entertained because they were untimely or inadequately presented to the Commissioner."

On the foregoing statement, the Court of Appeals concluded it was without power to review any aspect of the case because of § 732(c) of the Internal Revenue Code of 1939. In reaching this conclusion, the Court of Appeals held that § 732(c) had not been repealed by the Internal Revenue Code of 1954.

In order for the Court to understand the facts, it is necessary to first understand the statute involved.

During World War II, Congress imposed an excess profits tax on corporations. This tax on "excess profits" reached a maximum rate of 95%. In order to determine "excess profits," it was first necessary to

determine "normal profits." Generally speaking, "normal profits" were (1) a stated percentage of return on invested capital, or (2) 95% of the average income for the "base period" years 1936-1939, inclusive. The petitioner used the latter method.

Congress recognized that the "average income" yardstick for measuring normal profits might not be a "fair and just measure" of normal profits if certain events occurred during the base period. These included among others:

(a) The business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry.

(b) The taxpayer either during or immediately prior to the base period changed its capacity for production or operation so that its actual base period net earnings were an inadequate standard of normal earnings.

For each of the years 1940 to 1945, inclusive, petitioner filed claims for relief under § 722(b)(2) on the ground that petitioner's base period net earnings were an inadequate standard of its normal earnings and its excess profits tax was excessive and discriminatory on the ground that petitioner's business was depressed during the base period because of temporary economic circumstances unusual in its case, or because of the fact that the industry of which it is a member was depressed by reason of temporary economic events unusual in the case of the industry.

Very briefly summarized, the facts are that prior to the base period southern mills represented about one-third of the total United States capacity to produce sulphate pulp products. In 1936, one additional sulphate mill went into operation in the South. Eleven additional new sulphate pulp paper and board mills went into operation in the South in 1937 and 1938. The addition of the twelve new mills increased southern capacity from 3,335 tons a day to 8,000 tons a day, or to 80 per cent of the kraft paper and board capacity of the United States (R. 33). Corresponding increases in the capacity of container and bag manufacturers, who purchased and fabricated the mill products, lagged about a year behind the increase in mill capacity. This tremendous increase in productive capacity of kraft paper and board, and a lack of corresponding increase in the capacity of container and bag manufacturers to absorb the increased production caused a drastic reduction in the selling price of kraft paper and board for about half of the base period. However, this price depression was temporary and, by the end of 1939, prices had recovered almost to their 1936 and 1937 levels. As a result of this situation, petitioner lost money in 1938 and had a net income of only $439,775.76 in 1939. This compared with a net income of $1,804,287.53 in 1936 and $1,895,418.06 in 1937 (R. 42). By 1940, net income had recovered to $2,503,049.32.

The Tax Court found:

> "This increased capacity was over twofold what it was at the beginning of 1935. It was an outstanding development which represented the growth of an industry with possible social and economic effects on the southern region" (R. 33).

The Tax Court also found:

> "The daily capacity of the southern kraft mills more than doubled during this period of expansion. The effect of the construction of these new mills was far reaching" (R. 34).

In the light of these facts, the petitioner contends that the actual average base period net income is not a fair and just yardstick of normal earnings. The Tax Court, after making favorable evidentiary findings, made the ultimate finding that neither the petitioner nor its industry was depressed during the base period because of temporary economic events.

The Court of Appeals held that by virtue of § 732(c) Internal Revenue Code of 1939, it had no power to review this issue. In so doing, it held that the Internal Revenue Code of 1954 did not repeal § 732(c) of the Internal Revenue Code of 1939.

The petitioner filed timely claims for relief for each of the years in controversy (R. 16, 107). For 1940 the claim, among other things, asked relief under § 722(b)(4) due to a "change in the character of the business" during the base period.[1] The claim for 1940 checked the space provided on the form to show that relief was claimed under § 722(b)(4) but did not specifically mention that relief was claimed because of a "change in the character of the business" during the

---

[1] Sec. 722 (b) (4) provides for relief if: "* * * the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. * * * For the purpose of this subparagraph, the term 'change in the character of the business' includes * * * a difference in the capacity for production or operation, a difference in the ratio of non-borrowed capital to total capital. * * *"

base period on account of a difference in the ratio of non-borrowed capital to total capital. Over a period of years extensive detailed information on this issue was submitted to and considered by the Commissioner.

Before the Tax Court the Commissioner conceded that petitioner was entitled to relief under § 722(b)(4) because of a change in the character of its business during the base period years on account of a change in the ratio of borrowed capital to total capital. Relief was granted by the Tax Court on this ground for 1941 to 1945, inclusive, but was denied for 1940, without evidentiary findings, on the ground that the claim for refund had not been timely filed.

The Court of Appeals held it had no power to review this issue.

During the base period, the petitioner installed greatly improved pulp dehydrators, known as McDonald dehydrators. Without the new McDonald dehydrators, "There would not have been any way for petitioner to have gotten such a quantity of water out of the black liquor and still maintain any sizeable production" (R. 71).

Petitioner contended that the installation of the McDonalds was a change in the character of the business due to a change in the capacity for production or operation under § 722(b)(4). As stated above, the claims for relief showed they were based on § 722(b)(4), although they did not specifically state that they were based on a change in capacity for production or operation due to the installation of the McDonald dehydrators.

The Tax Court made detailed evidentiary findings that the machines which the McDonalds replaced were

not satisfactory. Too much chemical was lost by draining into the mill effluent. They caused pollution of the river. They could not produce satisfactorily for a demanding market. With them there would not have been any way to have maintained any sizeable production (R. 71). The McDonalds cured the situation. In addition, the McDonalds permitted petitioner to cook the pulp harder (R. 76). This produced a stronger and better quality product (R. 66).

In the opinion and without findings, the Tax Court held that the claim for increased capacity for production due to the McDonalds was not adequately raised in the claims for relief (R. 148).

The Court of Appeals held that the adequacy of a claim for refund was based solely on § 722, and that it had no power to review the action of the Tax Court on this issue.

For each of the years 1940 to 1945, inclusive, petitioner filed claims for relief under § 722(b)(4) on the ground that petitioner's average base period net income was an inadequate standard of its normal earnings and its excess profits tax was excessive and discriminatory because, during the base period, the petitioner changed its capacity for production and operation by the installation of Sutherland pulp refiners.

The Tax Court made detailed evidentiary findings that, at the beginning of the base period, the petitioner's mill was using its full rated electric generating capacity. The Jordan refiners it was then using required a great amount of power. Mechanical difficulties were being encountered with the drive motors of the Jordan refiners (R. 89). The old-style Jordan pulp refiners caused difficulties because their

power consumption was overloading the power plant. The cost of installing a new turbine plant would have been considerable and petitioner was hesitant about borrowing money as a result of experiences it had during the depression period. Buying power from outside sources was considered but the cost of getting the line into the mill was considerable and the supplier insisted on a large stand-by charge, so the matter was abandoned (R. 89, 125).

The installation of the Sutherland refiners during the base period more than cut in half the power requirements for refining pulp (R. 94-96). Total production in 1939 exceeded 1936 and 1937 production (R. 146). After making these detailed evidentiary findings, the Tax Court made ultimate findings that: (R. 98)

> "The installation of the Sutherland refiners by the Brown Paper Mill in the years 1936 to 1939 did not increase petitioner's capacity for production in those years."

The Court of Appeals held that it had no power to review this issue.

## REASONS FOR GRANTING THE WRIT

### I

**The Decision Below Is in Direct Conflict With the Decision of the Ninth Circuit in Helms Bakeries v. Commissioner (1956) 236 F. (2d) 3, 49 AFTR 1956.**

In the *Helms* case it was contended, as in the case at bar, that the ultimate findings of the Tax Court were contrary to the evidentiary findings. In the Court of Appeals the Government contended, as it contends here, that § 732(c) denied the Court of Appeals the power to consider the case. The basis of the contention was that the determination of the

question was necessary "solely" because of § 722. The Ninth Circuit states (p. 1962 App. hereto pp. 16a, 17a):

> "In view of the evidentiary findings of the Tax Court on this fact, its conclusion 'lack of productive capacity was not a factor which to any appreciable extent limited petitioners sales' appears to be arbitrary and contrary to its own findings.
>
> * * * * *
>
> "In light of the foregoing record in respect to relief sought by the petitioner under Section 722(b)(4), we are not precluded from assuming jurisdiction because of the provisions of Section 732(c)."

The *Helms* opinion appears in the Appendix hereto, p. 8a.

In the brief in support of the motion to dismiss the case at bar filed in the Court of Appeals, the Government recognized the conflict with the *Helms Bakeries* case. At page 24, the brief states:

> "* * * we believe, however, that the action of the Ninth Circuit in so entertaining the petition for review in respect to the issue under Section 722-(b)(4) in the *Helms Bakeries* case was palpably erroneous."

It is our contention that the Fifth Circuit in the case at bar stretched the word "solely" far beyond any reasonable or established meaning of that word. When an administrative tribunal of a court arbitrarily and capriciously finds ultimate facts contrary to its evidentiary findings such action is not due "solely" to the statute under which the action arose. It is rather a procedural matter which any concept of fair play

demands be remedied. The rule was well stated by the Second Circuit as follows:

> "When the evidence before the Board, as the trier of the facts, ought to be convincing, it may not say that it is not." *Blackmer* v. *Commissioner*, (1934) 70 F. (2d) 255, 13 AFTR 957

In the case at bar the petitioner accepts the evidentiary findings of the Tax Court (R. 16-102). Any fair reading of those findings shows that the conclusions are clearly arbitrary and contrary to the evidentiary findings.

This Court has held that finding so-called ultimate facts implies the application of standards of law. In so doing, it had no difficulty in setting aside the ultimate facts as determined by a District Court and affirmed by a Court of Appeals in an action to cancel a certificate of naturalization. *Baumgartner* v. *United States*, 322 U. S. 665.

Also this Court has held, in a case somewhat analogous to the case at bar, that the Court of Appeals for the District of Columbia has power to review certain action of the Tax Court in renegotiation cases. This is so despite the statutory provision that determinations of the Tax Court in renegotiation cases "shall not be reviewed by any Court or agency." *United States* v. *California Eastern Line*, (1955), 348 U. S. 351.

## II

**The Decision Below Is in Conflict With the Decision of the Second Circuit in Kemp Real Estate Co. v. Commissioner, (1953), 205 F. (2d) 236, 44 A. F. T. R. 31.**

In the case at bar, the Tax Court held that in some instances untimely and inadequate claims for refund

had been filed. The Fifth Circuit said it did not have power to review these questions. It states:

> "The question of reviewability may not be completely free from doubt, and taxpayer's contention receives some oblique support from the second Kemp case, 205 F. (2d) 236, which is somewhat analogous."

The *per curiam* opinion of the Second Circuit in the *Kemp* case states:

> "Since the Tax Court based its decision on the application as a matter of law of the doctrine of collateral estoppel, we have jurisdiction to review despite the provisions of § 732(c) of the Internal Revenue Code, 26 U. S. C. A. § 732(c). Compare H. Fendrich, Inc. v. Commissioner, 7 Cir., 192 F 2d 916 with George Kemp Real Estate Co. v. Commissioner, 2 Cir., 182 F. 2d 847, certiorari denied 340 U. S. 852, 71 S. Ct. 80, 95 L. Ed. 624. The decision was not, in the language of the statute, 'necessary solely by reason of section * * * 722.'"

Obviously, the issues in the case at bar do not depend "solely" on § 722. It should be noted that the *Kemp* case was decided prior to the enactment of the Internal Revenue Code of 1954.

## III

**The Decision Below Is Contrary to the Rule of Brownell v. Tom We Shung. (1956), 325 U. S. 180, 185, Which States There Shall Be No "Cutting Off" of Judicial Review of Administrative Agencies Unless Made by Clear Language or Supersedure.**

In the *Shung* case, the Immigration Act of 1952 provided that the decision of the inquiry officer was "final." Despite this "final" determination, this

Court stated that the alien was entitled to appellate review under the Administrative Procedure Act.

The "review of Tax Court decisions is governed by the Administrative Procedure Act." *Lincoln Electric Co.* v *Commissioner*, (C. A. 6, 1947), 162 F. (2d) 379, 35 A. F. T. R. 1470. The Tax Court is "not a court at all but merely an administrative agency." *Lasky* v. *Commissioner*, (C. A. 9, 1956) 235 F. (2d) 97, 49 A. F. T. R. 1696, affirmed per curiam, 352 U. S. 1027. The foregoing being true, the rule of the *Shung* case applies. The Court of Appeals stated in the case at bar that "The question of reviewability may not be completely free from doubt * * *." If the question is "close," this Court should follow its reasoning in the *Shung* case and not cut off review.

## IV

### The Decision Below Is in Conflict With the Explicit Language of the Internal Revenue Code of 1954.

Section 7851, 1954 Code, Paragraph (a)(6)(C) provides:

> "After the date of the enactment of this title, the following provisions of subtitle F shall apply to the taxes imposed by the Internal Revenue Code of 1939, notwithstanding any contrary provisions of such code:
>
> * * * *
>
> (iv) Chapter 76, relating to judicial proceedings."

Chapter 76 contains the provisions governing Court of Appeals review of Tax Court decisions.

§ 7851(a)(7) reads in part:

> "* * * If the repeal of any provision of the Internal Revenue Code of 1939 is not otherwise provided by this section or by any other section

of this title, *such provision is hereby repealed* effective on the day after the date of enactment of this title." (italics supplied)

It is difficult to conceive how Congress could have enacted more clear and unequivocal language than that quoted above. However, the Court below held that § 732(c) had not been repealed.

Credence is given to the position that Congress contemplated Appellate review of excess profits tax relief cases by the following.

Because of the dissatisfaction with the denial of the right of appellate review of excess profits tax cases, the Senate, on March 30, 1953, passed S. 984, which provided for Court of Appeals review in such cases. The bill was sponsored by the American Bar Association and approved by the Treasury Department. (Senate Report No. 116, 83rd Congress, 1st Session, ¶ 66,008 P-H Fed. 1953) A principal reason advanced for the enactment of the bill was that taxpayers were successful with respect to about 50 percent of the money involved in standard issue cases decided by the Tax Court which were subject to judicial review. Taxpayers were successful in securing the refund of only about 2 percent of the money involved in excess profits tax relief cases, which were not subject to judicial review. (Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83rd Congress, 1st Session, on S. 984, pages 2, 3 and 7). The bill was favorably reported to the House by the Judiciary Committee on the same day H. R. 8300, which was to become the 1954 Code, passed the House. No further action was taken on S, 984. The only inference which can be drawn from the failure of the House to act on a bill which had passed the Senate and

which had been favorably reported to the House was that the House believed the situation was covered by the Internal Revenue Code. The language of the 1954 Code justifies this assumption.

The "Korean" excess profits tax law[3] which applies to the years 1950-1953 does not contain any limitation upon appellate review. Consequently, the action in the 1954 Code of removing limitations on appellate review of World War II excess profits cases was not a new or drastic change.

## V

### The Question Is Important.

The question here involved is present in numerous cases and may be expected to be present in other cases.

The Sixth Circuit on June 30, 1958, decided the case of *The Patent Button Company* v. *Commissioner* on the authority of the case at bar. ¶ 58-5018 P-H Fed. 1958.

The case of *Crowell-Collier Publishing Co.* v. *Commissioner*, 25 T. C. 1268, involving the question of reviewability of § 722 cases has been argued before the Second Circuit.

The second appeal of *Helms Bakeries Company* v. *Commissioner* has been argued before the Ninth Circuit.

The numerous cases cited in the Court of Appeals in the case at bar represent but a few of the many excess profits tax relief cases which have been litigated.

## CONCLUSION

Certiorari should be granted so that the law may be settled and the Courts of Appeals relieved of the

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[3] § 430-475, Internal Revenue Code of 1939, as amended.

burden of repeatedly deciding various aspects of their power of review.

Respectfully submitted,

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September 8, 1958

## APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 16115

THE BROWN PAPER MILL COMPANY, INC., *Petitioner,*

*versus*

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

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**Petitions for Review of Decisions of The Tax Court of the United States (District of Louisiana)**

(May 8, 1958.)

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Before JONES, BROWN and WISDOM, Circuit Judges.

JONES, Circuit Judge: The Brown Paper Mill Co., herein called the taxpayer, manufactures and sells kraft paper and board. The taxpayer was incorporated in 1929. It and its predecessor corporation have been in operation since 1923.

The present controversy concerns the taxpayer's Federal excess profits taxes for the years 1940 through 1945. It filed claims for refund of income taxes overpaid for the years 1942 through 1945. It also filed applications for relief from and refund of excess profits taxes paid for the years 1940-1945. The Commissioner of Internal Revenue disallowed the application for relief and refund and determined that certain income and excess profits tax deficiencies existed with respect to the years in question. Thereupon, the taxpayer instituted proceedings in the Tax Court. The latter passed upon various issues, some pertaining to excess profits tax relief and some relating to other matters. Some

of the issues were resolved in favor of the taxpayer and some in favor of the Commissioner, as reflected in its opinion and decision. *The Brown Paper Mill Co.* v. *Commissioner of Internal Revenue*, 23 T. C. 47.

Pursuant to the provisions of Sections 7482, 7483, and 7851(a)(6)(c) of the Internal Revenue Code of 1954, 26 U.S.C.A. (I.R.C. 1954) §§ 7482, 7483, 7851(a)(6)(C), the taxpayer sought review in this Court of the Tax Court's decision. The Commissioner moved to dismiss, asserting that under Section 732(c) of the Internal Revenue Code of 1939, 26 U.S.C.A. (I.R.C. 1939), § 732(c), we cannot review the Tax Court's determinations of the issues here presented. The motion and the argument on the merits were heard together.

The taxpayer raises several questions, all of which pertain to excess profits tax relief sought by it under the provisions of Section 722 of the Internal Revenue Code of 1939, 26 U.S.C.A. (I.R.C. 1939), § 722, and denied by the Commissioner and the Tax Court. The taxpayer urges a reversal on the grounds (a) that the Tax Court made adverse ultimate findings contrary to favorable detailed evidentiary findings; (b) that the Tax Court reached certain conclusions without there being any findings of fact in support thereof; and (c) that the Tax Court determined that certain theories of relief could not be entertained because they were untimely or inadequately presentd to the Commissioner. For reasons which follow, it is concluded that the motion to dismiss must be granted. Therefore, no inquiry will be made into the merits of the petition for review.

Section 732(c) of the Internal Revenue Code of 1939 reads as follows:

> "If • • • the determination of any question is necessary solely by reason of • • • section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board." 26 U.S.C.A. (I.R.C. 1939) § 732(c).

The Board is now the Tax Court. The denial of judicial review is constitutional, as Section 722 is a special relief provision extended as a matter of legislative grace. *James F. Waters, Inc.* v. *Commissioner of Internal Revenue*, 9th Cir. 1947, 160 F. 2d 596. See also *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, 48 S. Ct. 587, 72 L. Ed. 985.

The first question which arises with respect to Section 732(c) is whether it has been repealed by the 1954 Internal Revenue Code. Such repeal, if any, was not express. However the argument is advanced by taxpayer that the language of Section 7851(a)(6)(C) of the 1954 Code clearly repeals the mentioned action. Section 7851(a)(6)(C) provides that following the enactment of the 1954 Code certain procedural provisions of the new Code shall apply to the taxes imposed by the 1939 Code, "notwithstanding any contrary provisions of" the 1939 Code. Among the provisions thus made applicable to earlier taxes are those in the chapter relating to judicial proceedings, including Sections 7482 and 7483 which authorize review of Tax Court decisions by the Courts of Appeal in the same manner as judgments of district courts in non-jury cases. No exception to such review is set forth, and therefore it is argued that the designation by Section 7851(a)(6)(C) of Sections 7482 and 7483 to govern appellate review of Tax Court decisions "notwithstanding any contrary provisions of" the 1939 Code in effect repeals the provisions of Section 732(c) of the 1939 Code which prohibit review.

Neither the textual analysis nor legislative history sustains the taxpayer's contention but rather they show that Section 732(c) still applies with respect to review of World War II excess profits tax relief proceedings. The 1954 Code provisions which are made applicable to 1939 Code taxes by Section 7851(a)(6)(C) deal with matters of general procedure and significance, cutting across the various taxes imposed. Specifically, Sections 7482 and 7483 set forth the method of review which is to be the normal one in respect

of the various taxes imposed by the law. A particular procedure created by statute for a specific type of tax or for a specific type of tax relief would be operative in its area despite the existence of a different general procedure. This principle is one of basic statutory construction, specialia generalibus derogant. The 1939 Code had general procedural provisions directly comparable to the ones listed in Section 7851(a)(6)(C) of the 1954 Code, including provisions essentially identical with Sections 7482 and 7483 of the latter. Some of the general provisions of the 1939 Code differed from those of the 1954 Code, and to that extent the phrase "notwithstanding any contrary provisions of such code" had meaning as establishing that the later provisions should govern. Sections 7482 and 7483 of the 1954 Code replaced Sections 1141 and 1142 of the 1939 Code. These set forth the normal review procedures and do not relate to the particular appeal provisions applicable in special situations such as Section 732(c). Repeals by implication are not favored. We do not think that implied repeal of Section 732(c) was any more intended in 1954 than in 1948 when there was an amendment of Section 1141 of the 1939 Code, following which a like argument was rejected. See *George Kemp Real Estate Co.* v. *Commissioner*, 2d Cir. 1950, 182 F. 2d 847, Cert. den. 340 U.S. 852, 71 S. Ct. 80, 95 L. Ed. 624. The difference in language between the 1948 and 1954 enactments does not require a different holding.

If any doubt should remain as to the effect of the 1954 provision, it would be dispelled by the legislative history. Sections 7482 and 7483 were regarded as reenactments without substantial change of Sections 1141 and 1142 of the 1939 Code. 3 U.S. Code Cong. & Admin. News (1954) 4017, 4582; 4621, 5264. The committee explanation of Section 7851(a)(6)(C) supports the foregoing analysis. Both the Senate and House Committees reported:

> "The provisions of the 1954 code which apply to the taxes imposed by the 1939 code are the type which are

not closely related to a particular tax but involve the general administration of the revenue." 3 U.S. Code Cong. & Admin. News (1954) 4017, 4591; 4621, 5276.

We therefore reach the conclusion that Section 732(c) of the 1939 Code is still effective with respect to review of World War II excess profits tax relief cases.

The next question for consideration with respect to the motion to dismiss is whether or not Section 732(c), properly construed, forbids review by this Court of the issues raised by the taxpayer. The determinations of the Tax Court which we are asked to review involve no Sections of the Internal Revenue Code other than Section 722. The case is thus distinguishable from *Stimson Mill Co.* v. *Commissioner*, 9th Cir. 1947, 163 F. 2d 269; *Dowd-Feder* v. *Commissioner*, 6th Cir. 1949, 173 F. 2d 673; and *Packer Publishing Co.* v. *Commissioner*, 8th Cir. 1954, 211 F. 2d 612. The taxpayer's argument is that the determinations were not necessary solely by reason of Section 722, because they involved questions common to all tax cases. The general nature of the determinations of the Tax Court of which the taxpayer complains has been set forth above. The first two categories relate to the manner in which the court handled the evidence before it in arriving at the conclusion that certain events did not make the taxpayer's base period abnormal, a conclusion necessary solely for Section 722 relief purposes. The process involved was the normal one of finding facts from the evidence, and application of the Section 722 relief formulae was also involved. Such matters, involving questions of fact and of mixed fact and law, are precisely what Congress wished to have finally resolved in the Tax Court in the exercise of its special knowledge in the field. See 7A Mertens, Law of Federal Income Taxation, § 42.145, and the many references to the legislative history contained therein. The final resolution of matters of fact and law which directly and solely relate to the determination of whether or not to grant Section 722 relief is for the Tax Court, and this Court is not empowered to cure any

errors which may occur in that process. See *Colonial Amusement Co. of Philadelphia* v. *Commissioner*, 3d Cir. 1949, 173 F. 2d 568; *George Kemp Real Estate Co.* v. *Commissioner, supra; Colorado Milling & Elevator Co.* v. *Commissioner*, 10th Cir. 1953, 205 F. 2d 551; *A. B. Frank Co.* v. *Commissioner*, 5th Cir. 1954, 211 F. 2d 497; *Corn Products Refining Co.* v. *Commissioner*, 2d Cir. 1954, 215 F. 2d 513; *Standard Hosiery Mills* v. *Commissioner*, 4th Cir. 1957, 249 F. 2d 469. It follows that the determinations made by the Tax Court are not reviewable here.

Certain of the taxpayer's theories of obtaining Section 722 relief were rejected, not on the merits, but because they were held to have been untimely or inadequately presented by it to the Commissioner. The determination as to whether or not to consider the claims on the merits involved a construction of the Commissioner's regulations promulgated under Section 722(d) of the 1939 Code, because that Section conditioned consideration of relief upon compliance with the regulations. The taxpayer's claims as to certain matters were deemed to have been presented inadequately under the regulations and as to others to have been presented untimely. We cannot see how those determinations were required by anything other than Section 722, which would of course include the regulations under it. See *Standard Hosiery Mills* v. *Commissioner, supra.* Matters of law as well as matters of fact are denied review by Section 732(c). *George Kemp Real Estate Co.* v. *Commissioner, supra; James F. Waters, Inc.*, v. *Commissioner, supra.* To be distinguished from the situation here presented are those cases having to do with the extent of the Tax Court's jurisdiction in excess profits tax relief proceedings. Such cases are *Commissioner* v. *Blue Diamond Coal Co.*, 6th Cir. 1956, 230 F. 2d 312; *Commissioner* v. *Seminole Mfg. Co.*, 5th Cir. 1956, 233 F. 2d 395; *H. Fendrich, Inc.* v. *Commissioner*, 7th Cir. 1951, 192 F. 2d 916, *H. Fendrich, Inc.* v. *Commissioner*, 7th Cir., 1957, 242 F. 2d 803, which reviewed the question of whether non-relief issues could be considered by the Tax Court in an excess profits

tax relief case. And see *George Kemp Real Estate Co.* v. *Commissioner*, 2d Cir. 1953, 205 F. 2d 236, cert. den. 346 U.S. 876, 74 S. Ct. 129, 98 L. Ed. 384, reviewing the question of whether the doctrine of collateral estoppel should have been applied in a Section 722 case.

The taxpayer claims that even if the rejection on the bases of untimely and inadequate filing were justified under the regulations and Section 722(d), the claims should have been considered because the Commissioner investigated their merits and thus waived his right under the regulations to reject them. The taxpayer contends that the Tax Court's determination of the waiver problem is subject to review because it was not necessitated solely by reason of Section 722. The question of reviewability may not be completely free from doubt, and taxpayer's contention receives some oblique support from the second Kemp case, 205 F. 2d 236, which is somewhat analogous. However, it would seem more in keeping with the intent of Section 732(c) to hold, as we do, that the Tax Court's determination of the waiver issue is not reviewable by this Court. Cf. *Standard Hosiery Mills* v. *Commissioner*, *supra*. The basic issue was whether or not the relief claims were precluded from consideration by Section 722(d). The questions which had to be resolved in order to determine that issue were whether the regulations had been complied with and whether, if there had been non-compliance, the Commissioner's actions had rendered compliance unnecessary. Those questions of fact and law required solution solely because of the provisions of Section 722. Under the statute review of the Tax Court's determinations cannot be had in this Court.

The motion to dismiss the petition is granted.

PETITION DISMISSED

## APPENDIX B

HELMS BAKERIES v. COMMISSIONER
(U.S. Court of Appeals, Ninth Circuit, No. 14808,
August 14, 1956)

Geo. T. Altman, Beverly Hills, Calif., attorney for petitioner.

H. Brian Holland, Asst. Attorney General; Harry Marselli, Lee A. Jackson, Attorney, Dept. of Justice, Wash., D. C., attorneys for respondent.

Petition to Review a Decision of The Tax Court of the United States.

Before: Orr and Chambers, Circuit Judges, and Jertberg, District Judge.

Jertberg, District Judge:

This proceeding involves determination of Federal Excess Profits Taxes for the calendar years 1943, 1944 and 1945.

The petitioner, Helms Bakeries (hereinafter referred to as the petitioner) is a California corporation. It filed its tax returns, including its excess profits tax returns, for the years 1940-1945 with the Collector of Internal Revenue for the Sixth District of California.

The only issues presented to the Tax Court for decision related exclusively to the petitioner's right to relief under Section 722 of the Internal Revenue Code of 1939 for the taxable years 1943, 1944 and 1945. The taxpayer was in existence during the entire base period—1936 through 1939—and was entitled to use an excess profits credit based on income under the provisions of Section 713 of the code.

The pertinent sections before this court are Section 722(b)(2) and Section 722(b)(4).

Section 722(a) reads: "In any case in which a taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be

used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. * * *"

Under section 722(b)(2) relief is allowed if "the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer, or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry."

Under section 722(b)(4) relief is allowed if "the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. * * *" It is also provided under that section that "if the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. * * *" The term "change in the character of the business" is defined in the section to include "a difference in the capacity for production or operation."

Specifically, before the Tax Court, the petitioner ascribed error to the Commissioner of Internal Revenue and rested its claim to the right to Section 722 relief for the taxable years in question, upon two grounds: (1) That its base period earnings were depressed by reason of a price war within the purview of Section 722(b)(2); and (2) That it had increased its capacity for production and operation within the purview of Section 722(b)(4).

After the trial on the merits before the Tax Court, that Court handed down its findings of fact and opinion holding that petitioner was not entitled to any relief under Section 722(b)(2) or under Section 722(b)(4), and thereafter entered its decision in favor of the Commissioner. The opinion of the Tax Court bore a notation at the end reading as follows: "Reviewed by the Special Division." The Tax Court then entered its decision in the case as above indicated. Petitioner filed a motion to amend the findings of fact, which motion was denied. Thereafter petitioner filed a motion to vacate the decision of the Tax Court, and for reconsideration, and that motion was subsequently set for hearing before the Tax Court, and after hearing and submission of memoranda, the motion was denied.

The questions presented for review by this Court, as stated by petitioner, are:

(1) "Whether in computing relief from excess profits taxes, under Section 722(b)(2), I.R.C. 1939, computation of the constructive average base period net income on a basis which recognizes and makes allowance for the fact that the taxpayer was a growing corporation may be denied because computation under a formula which also recognizes and makes allowance for the fact of growth is permitted under Section 713(f) of that code.

(2) Whether the Tax Court denied petitioner due process of law in:

(a) Substituting its arbitrary and capricious judgment—in the form of an ultimate finding 'that lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales'—for the judgment of petitioner's president and general manager were:

(1) Said president and general manager, as found by the court, considered that there was an available market for the goods to be produced by the additional productive capacity;

(2) Said president and general manager, as found by the court, was an experienced executive in the bakery industry whom it regarded as aggressive and foresighted; and

(3) There is a complete absence of any other finding on this point.

(b) Making the arbitrary distinction between a change in capacity which 'caused', and one which 'permitted,' expansion and growth.

(c) Failing to make an ultimate finding or other determination of fact on the issue of change in capacity for operation, adequate data for computation thereof being contained in the evidentiary findings.

(d) Failing to apply to petitioner the principle of 'back-cast' of income from 1939, the basis of growth being indirectly given effect through such back-cast principle, although it applied that principle in cases involving other taxpayers.

(3) Whether the Tax Court properly and fully carried out the review by a special division required by Section 732(d), I.R.C. 1939, although (a) that court promulgated no rules of any kind under that section, (b) taxpayers were never informed of their rights and procedures, if any, in respect of such review, (c) the record contains nothing in respect of such review except the sole and simple fact that the findings and opinion had been reviewed by the special division, and (d) petitioner's motion to vacate and for reconsideration was denied by the Tax Court without consideration by the special division.

(4) Whether this Court has jurisdiction to review the determination of the Tax Court to the extent to which the above questions are involved."

Petitioner does not challenge the findings of fact of the Tax Court, except the findings contained in the last two paragraphs thereof, which read as follows:

"Lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales.

The excess profits tax pay by petitioner for the years in issue was not excessive and discriminatory. Petitioner was not entitled to a constructive average base period net income which was large enough to produce a credit greater than the credit received under Section 713 of the 1939 Code."

Respondent concedes that this Court has jurisdiction to review the questions presented as to whether the petitioner has been accorded a review by the Special Division of the Tax Court in keeping with Section 732(d), but contends that this Court should decline to take jurisdiction of the petition for review in so far as it relates to all other matters attempted to be presented to his Court, namely, the points made with respect to the decision of the Tax Court as to the petitioner's right to relief under the provisions of Section 722(b)(2) and Section 722(b)(4) because of the prohibition contained in Section 732(c).

We will first consider petitioner's contentions in respect to Section 732(d). This section provides: "The determination and redeterminations by any division of the Tax Court involving any question arising under Section 721(a)(2)(c) or Section 722 shall be reviewed by a special division of the Tax Court which shall be constituted by the Presiding Judge and consist of not less than three members of the Tax Court. The decisions of such special division shall not be reviewable by the Tax Court, and shall be deemed decisions of the Tax Court."

The petitioner's contentions on this subject are summarized under paragraph 3 of its "Statements of Questions Presented for Review" supra.

The petitioner has misinterpreted the function of the "Special Division". The review by the Special Division required by Section 732(d) is not intended to be similar to a review by an Appellate Court with the usual opportunity to submit briefs and to make oral arguments. Because of

the complexities of the relief provisions of the Excess Profits Tax law, Congress provided for Special Divisions within the Tax Court for the purpose of reviewing decisions involving these abnormalities provisions. These Special Divisions were composed not only of experts in tax law, but of experts who were to keep abreast of legislation and construction of questions of law arising under these abnormalities provisions. When a Judge of the Tax Court is assigned to hear and decide a case which involves these abnormalities sections, his opinion is automatically reviewed by the Special Division assigned to review the particular section involved. This review within the Tax Court itself was discussed in Green Springs Dairy v. Commissioner, 208 Federal 2d 471 [44 AFTR 850, where the Court said that the purpose of Congress in enacting section 732(d) was not "to secure a reargument of the case, but to secure a consistent and uniform application of the principles of the Excess Profits Tax statute by a group familiar with the provisions involved."

The fact that the petitioners' motions to amend the findings and for reconsideration were denied by the Division, whose decision was approved by the "Special Division", does not establish that the function of the "Special Division" was usurped. In denying such motions, the Division simply refused to disturb the decision which the "Special Division" had already approved. We hold that the petitioner was not denied due process of law because it was not given an opportunity to appear, argue, or submit briefs before the "Special Division".

The next point for consideration is whether or not this Court should decline jurisdiction because of the provisions of Section 732(c). This section provides: "If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court."

Petitioner contends that the determination of all remaining questions presented by it for review is not made necessary "solely by reason of Section 722" and hence the provisions of Section 732(c) do not prohibit review by this Court.

Petitioner argues: (1) That the question presented under paragraph 1 of its "Statements of Questions on Appeal" (supra) involves the application and effect of Section 713 (f); (2) That the questions presented under paragraph 2, in all of its parts, involve the denial to petitioner of due process under the Fifth Amendment to the Constitution of the United States, and that as to part "d" thereof, there is also involved the duty of the Tax Court under Section 1117 of the 1939 Code. We will consider these points ad seriatim.

Under point 1, petitioner states that the Tax Court erroneously disregarded petitioner's growth because an adjustment for growth had been allowed petitioner under Section 713(f). On this issue the Tax Court found that "The Excess Profits Tax paid by petitioner for the years in issue was not excessive and discriminatory. Petitioner was not entitled to a constructive average base net income which was large enough to produce a credit greater than the credit received under Section 713 of the 1939 Code." We do not construe the decision of the Tax Court in denying relief that it expressly or impliedly held, based on the foregoing finding, that the petitioner was precluded from receiving any relief under Section 722(b)(2), because it had received the benefit of Section 713(f). We construe the finding to mean simply that under the facts presented to the Tax Court, the petitioner failed to establish that any relief which the Tax Court could give under Section 722(b)(2) would result in a credit greater than the petitioner had already received under Section 713(f). We therefore hold that the determination of the question presented under this heading is made necessary solely by reason of Section 722 (b)(2), and that, therefore, under Section 732(c), this Court is without jurisdiction to pass upon that issue.

Under point (2) above, petitioner argues that the decision of the Tax Court was arbitrary and capricious, contrary to the facts found by the Tax Court, and that the Tax Court failed to make a finding on a material issue presented to it.

Petitioner sought relief under Section 722(b)(4) "upon the basis of a change in its capacity for operation and production occurring within the base period." The Tax Court found that "During the base period there was a change in the productive capacity of the petitioner. Lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales." There is no finding by the Tax Court on the issue of a change in the petitioner's capacity for operation occurring within the base period.

With respect to the change in petitioner's capacity for production occurring within the base period, the Court found that there was a change in the productive capacity of the petitioner's business during the base period; that the President and General Manager of petitioner was an experienced executive in the bakery industry prior to petitioner's organization in 1931; that during the period 1931 to 1939 petitioner made nine additions to its plant; that on December 15, 1931, petitioner completed the installation of its first traveling oven; that on April 9, 1934, petitioner completed the installation of its second travelling oven; that the installation of a third traveling oven was completed on June 3, 1937; at that time, space was provided for the eventual installation of a fourth oven, and the electrical wiring, fixtures, plumbing and other connections were installed; that petitioner was financially unable to install a fourth traveling oven in 1937, even though its management considered that there was an available market for such additional production; that on December 5, 1939, petitioner completed the installation of its fourth and largest traveling oven; that during the base period the baking area of petitioner's traveling ovens increased from 1,260 square feet to 2,688 square feet; that during the same period petitioner acquired additional bread and cake machinery, bread

and cake tools, and bread and cake fixtures for use with its increased baking capacity; that petitioner in 1937 spent $10,000 for electrical wiring and other connections for the additional oven, but could not install the oven then because of financial limitations.

On this phase of the case the Tax Court relied on Green Spring Dairy, Inc., 18 TC 217 which the Tax Court stated "is strikingly similar to the case at bar * * *." The following quotation from the Green Spring case omitted from the opinion of the Tax Court in the instant case makes that case a poor reed on which to rely. The omitted quotation is as follows:

"While petitioner experienced difficulty with its facilities toward the end of 1935, the difficulty lay in its distribution and storage facilities and not in its production facilities; moreover, corrective measures were taken before the end of 1935 to increase distribution and storage capacity through the opening of a branch station. Although there was undoubtedly a certain amount of congestion in petitioner's plant, we are satisfied that it had not yet reached the limit of its capacity, and that its sales or acquisition of new customers was not in any way impeded. Throughout these years petitioner's operation and management were in the hands of tried and capable businessmen, *who had the resources to construct a new plant earlier if it had been necessary, and we are unable to conclude that they did not act in time*". (Italics ours)

In the instant case the Tax Court found that the petitioner could not install the additional oven because of financial difficulties which finding is directly contrary to the statement in the Green Spring Dairy case in which it was stated that the taxpayer there had the resources to construct a new plant earlier if it had been necessary. Under a fair construction of the finding of the Tax Court there was an available market in 1937 for additional production.

In view of the evidentiary findings of the Tax Court on this subject, its conclusion "lack of productive capacity was not a factor which to any appreciable extent limited peti-

tioner's sales" appears to be arbitrary and contrary to its own findings.

As above stated, the Tax Court failed to make a finding on the issue of a change in petitioner's capacity for operation (as distinguished from capacity for production) occurring within the base period. As above noted, petitioner sought relief upon the basis of a change in its capacity for operation *and* production. It would be a rare instance where productive capacity alone would produce income. In all but the most rare instances there must not only exist productive capacity, but also a market must be found or developed, in order to produce income. The Tax Court found that petitioner added in 1939, twenty-six franchise routes and five coach routes, which included in 1939 extensions to Ventura, Santa Barbara and San Diego counties; that petitioner always installed ovens in anticipation of further development of its markets; that to avoid offering stale goods to customers, it was petitioner's policy to get the oven capacity ready, and then develop the market, i.e., the route; that during the period of July 1, 1939 to March 1, 1940, petitioner spent approximately $50,000.00 for suburban loading rooms, and $79,000.00 for trucks, trailers, coaches and franchise cars, and that petitioner was committed to its 1939-1940 expansion program prior to December 31, 1939. The Tax Court should have made a finding as to whether or not, if this increase in capacity for operation had been made two years earlier, a higher level of earnings would have been reached at the end of the base period, and, if so, the amount thereof.

In light of the foregoing record in respect to relief sought by the petitioner under Section 722(b)(4), we are not precluded from assuming jurisdiction because of the provisions of Section 732(c).

Accordingly, the petition for review is dismissed for lack of jurisdiction in respect to the relief sought by petitioner under Section 722(b)(2) and remanded to the Tax Court for further consideration of the relief sought by petitioner under Section 722(b)(4).

## APPENDIX C

## STATUTES INVOLVED

**Internal Revenue Code of 1954:**

SEC. 7482. COURTS OF REVIEW.

(a) *Jurisdiction*—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

(b) *Venue.*—

(1) *In general.*—Except as provided in paragraph (2), such decisions may be reviewed by the United States Court of Appeals for the circuit in which is located the office to which was made the return of the tax in respect of which the liability arises, or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

(2) *By agreement.*—Notwithstanding the provisons of paragraph (1), such decisions may be reviewed by any United States Court of Appeals which may be designated by the Secretary or his delegate and the taxpayer by stipulation in writing.

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a

petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

SEC. 7851. APPLICABILITY OF REVENUE LAWS.

(a)(6)(C). *Taxes imposed under the 1939 Code.*—After the date of the enactment of this title, the following provisions of subtitle F shall apply to the taxes imposed by the Internal Revenue Code of 1939, notwithstanding any contrary provisions of such code:

* * * *

(iv) Chapter 76, relating to judicial proceedings.

* * * *

(a)(7). * * * If the repeal of any provision of the Internal Revenue Code of 1939 is not otherwise provided by this section, or by any other section of this title, such provision is hereby repealed effective on the day after the enactment of this title.

Internal Revenue Code of 1939:

SEC. 713. EXCESS PROFITS CREDIT—BASED ON INCOME

(a) *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic corporations.* In the case of a domestic corporation—

(A) 95 percentum of the average base period net income,

(B) Plus 8 percentum of the net capital addition as defined in subsection (g), or

(C) Minus 6 percentum of the net capital reduction as defined in subsection (g).

(b) *Base Period.*

(1) *Definition.* As used in this section the term "base period"—

(A) If the corporation was in existence during the whole of the forty-eight months preceding the beginning of its first taxable year under this subchapter, means the period commencing with the beginning of its first taxable year beginning after December 31, 1935, and ending with the close of its last taxable year beginning before January 1, 1940, and

* * * *

SEC. 722. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that in the cases described in the last sentence of section 722(b)(4) and in section 722 (c), regard shall be had to the change in the character of the business under section 722 (b)(4) or the nature of the taxpayer and the character of its business under section 722 (c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

* * * *

(2) the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry.

* * * *

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services furnished, a difference in the capacity for production or operation, a difference in the ratio of non-borrowed capital to total capital, and the acquisition before January 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor was eliminated or diminished. Any change in the capacity for production or operation of the business consummated during any taxable year ending after December 31, 1939, as a result of a

course of action to which the taxpayer was committed prior to January 1, 1940, or any acquisition before May 31, 1941, from a competitor engaged in the dissemination of information through the public press, of substantially all the assets of such competitor employed in such business with the result that competition between the taxpayer and the competitor existing before January 1, 1940, was eliminated, shall be deemed to be a change on December 31, 1939, in the character of the business or

(5) of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein.

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commisioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

SEC. 732. REVIEW OF ABNORMALITIES BY BOARD OF TAX APPEALS—(a) PETITION TO THE BOARD.

If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the

Commissioner, and the disallowance relates to the application of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

(b) *Deficiency Found by Board in case of claim.*—If the Board finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for refund described in subsection (a) and the Board further finds that there is a deficiency for such year, the Board shall have jurisdiction to determine the amount of such deficiency and such amount shall, when the decision of the Board becomes final, be assessed and shall be paid upon notice and demand from the collector.

(c) *Finality of determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board.

(d) *Review by special division of Board.*—The determinations and redeterminations by any division of the Board involving any question arising under section 721 (a) (2) (C) or section 722 shall be reviewed by a special division of the Board which shall be constituted by the Chairman and consist of not less than three members of the Board. The decisions of such special division shall not be reviewable by the Board, and shall be deemed decisions of the Board.

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JAMES R. BROWNING, Clerk

No. 351

# In the Supreme Court of the United States

OCTOBER TERM, 1958

THE BROWN PAPER MILL COMPANY, INC., PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
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# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 351

THE BROWN PAPER MILL COMPANY, INC., PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

### OPINIONS BELOW

The opinion of the Tax Court (R. 16–158) is reported at 23 T. C. 47. The opinion of the court of appeals (Pet. 1a–7a) is reported at 255 F. 2d 77.

### JURISDICTION

The judgment of the court of appeals was entered on May 8, 1958. A timely petition for rehearing was denied on June 11, 1958. The petition for a writ of certiorari was filed on September 9, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

### QUESTIONS PRESENTED

1. Whether the ultimate findings of fact made by the Tax Court in denying excess profits tax relief

under § 722 of the Internal Revenue Code of 1939 may be reviewed by the court of appeals for alleged inconsistency or lack of evidentiary findings, notwithstanding the provision of § 732 (c) of the Code that the Tax Court's determination of any question made "necessary solely by reason of * * * section 722 * * * shall not be reviewed or redetermined by any court."

2. Whether the Tax Court's denial of such relief because the claim was not adequately presented to the Commissioner within the time prescribed by the regulations may be reviewed by the court of appeals.

STATUTES INVOLVED

Section 732 of the Internal Revenue Code of 1939, 55 Stat. 17 (as amended, 26 U. S. C. (1952 ed.) 732):

> SEC. 732. REVIEW OF ABNORMALITIES BY THE TAX COURT OF THE UNITED STATES.
>
> (a) *Petition to the Tax Court.*—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with The Tax Court of the United States for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and

collection of taxes or the refund or credit of overpayments.

(b) *Deficiency Found by the Tax Court in Case of Claim.*—If the Tax Court finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for refund described in subsection (a) and the Tax Court further finds that there is a deficiency for such year, the Tax Court shall have jurisdiction to determine the amount of such deficiency, and such amount shall, when the decision of the Tax Court becomes final, be assessed and shall be paid upon notice and demand from the collector.

(c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court.

(d) *Review by Special Division of the Tax Court.*—The determinations and redeterminations by any division of the Tax Court involving any question arising under section 721 (a) (2) (C) or section 722 with respect to any taxable year shall be reviewed by a special division of the Tax Court which shall be constituted by the presiding judge and consist of not less than three judges of the Tax Court. The decisions of such special division shall not be reviewable by the Tax Court, and shall be deemed decisions of the Tax Court.

STATEMENT

Petitioner filed with the Commissioner applications for relief under § 722 of the Internal Revenue Code of

1939[1] as to excess profits taxes paid for the years 1940–1945. (The nature of the relief authorized by § 722 is indicated in the introductory paragraphs of the Argument, *infra*, pp. 6–8.) The Commissioner denied the claims for relief. On taxpayer's petition for redetermination, the Tax Court held as follows with respect to the § 722 relief claims relevant here:

(1) Taxpayer claimed that its industry (manufacture of kraft paper) was temporarily depressed during the base period (1936–1939) because of a temporary over-expansion of capacity in the industry. The Tax Court found as a fact that the growth in the number of mills during that period was "not unusual, but was about normal" and that neither petitioner's business nor the industry was depressed "because of any temporary economic event or circumstance, unusual in its history or that of its industry" (R. 128), and accordingly denied any relief on that ground (R. 141–145).

(2) In its application for relief filed with the Commissioner for 1940, petitioner claimed relief under § 722 (b) (4) for a "change in the character of the business" during the base period, but did not indicate the nature of the change. Section 722 (b) (4) defines that phrase as including a change in operation or management, a change in products or services, a change in capacity for production or operation, a change in the ratio of borrowed capital to total capital, or the acquisition of a competitor. In the Tax Court, petitioner claimed that there had been a change

[1] Unless otherwise indicated, section references are to the 1939 Code.

in the ratio of its borrowed capital to its total capital. The Tax Court, while granting relief on that ground for years for which it had been timely asserted (1941–1945), denied relief for 1940 because that basis for relief had not been specified in the application filed with the Commissioner, as required by the regulations under § 722 (R. 134–137).[2]

(3) In the Tax Court petitioner claimed an increased capacity for production during the base period by reason of the installation of "McDonald dehydrators". The applications for relief filed with the Commissioner had asserted only, without specification, a "change in the character of the business" under § 722 (b) (4). The Tax Court denied relief on this ground because it was not timely asserted (R. 148), although it did take the new dehydrators into account in allowing a reconstruction of base period net income on the ground of a change in petitioner's method of operation (R. 148–149).

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[2] Section 722 (d) requires application for relief to be made to the Commissioner "in accordance with regulations prescribed by the Commissioner." The regulations under that section in effect when the application was filed (Sept. 1943, R. 134) required such applications to be filed within the time prescribed for claims for refund and provided:

> * * * the application for relief shall set forth in detail and under oath each ground under section 722 upon which the claim for relief is based, and facts sufficient to apprise the Commissioner of the exact basis thereof. The mere statement of the provision or provisions of law under section 722 upon which the claim for relief is based shall not constitute an application for relief within the meaning of section 722. (Regs. 109, § 30.722–5 (a)).

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(4) Petitioner also claimed an increased capacity for production by reason of the installation of "Sutherland refiners". The Tax Court found as a fact that these new machines, while more cheaply performing one phase of production, did not increase the plant's capacity for production of the final product and denied the relief sought on that ground (R. 128, 145–148). The new refiners were, however, taken into account in allowing a reconstruction of base period net income on the ground of a change of method of operation (R. 148–149).

On petition for review to the court of appeals, petitioner alleged that the Tax Court's ultimate conclusions on the above issues were inconsistent with, or unsupported by, its evidentiary findings and that its holding that some of the claims were not timely and adequately presented to the Commissioner was erroneous. The court of appeals held that each of these contentions related to determinations made "necessary solely by reason of * * * section 722" within the meaning of § 732 (c) of the Code and hence were not reviewable by the court of appeals (Pet. 5a–7a). It also held that § 732 (c) of the 1939 Code had not, as petitioner claimed, been repealed by the 1954 Code (Pet. 3a–5a). Accordingly, the court dismissed the petition for review without reaching the merits.

## ARGUMENT

The Excess Profits Tax Act of 1940 (§§ 710 *et seq.* of the Internal Revenue Code of 1939) was designed to recover in taxes excessive profits arising out of wartime conditions. It imposed a very high rate of tax on corporations on their profits in excess of a

norm (the "excess profits credit") representing the taxpayer's "normal" profits. In general, the "excess profits credit" was based on the taxpayer's average profits during the presumably "normal" period of 1936–1939 (the "average base period net income").[3]

The difference between a taxpayer's income during the "base period" and its income during the war years might often, of course, be due to factors other than wartime conditions and thus not provide a fair measure of its excessive profits. To afford relief from the resulting inequities, three kinds of special adjustments (in addition to all others) were authorized: Section 711 (b) (1) (H–K) permitted "abnormal" deductions during the base period to be eliminated in determining the average base period net income. Section 721 permitted "abnormal" items of income realized in the excess profits tax year but attributable to other years to be reallocated to such years. Section 722, the section directly involved here, was a general relief provision available when the taxpayer could show that its average base period net income was "an inadequate standard of normal earnings" because of various enumerated factors causing base period earnings to be less than "normal"—such as unusual interruptions of production, economic circumstances peculiar to the taxpayer or its industry, newness of the business, or a change in the character or capacity of the business during the base period. If the inadequacy of the average base period net income was thus

[3] An optional method of computing the excess profits credit as a percentage of the taxpayer's "invested capital" (§ 714) is not involved here.

established, a "fair and just amount representing normal earnings" would be determined and used as a "constructive" average base period net income for purposes of arriving at the excess profits credit.

Because of the immense complexity of the issues raised by claims for relief under these so-called "relief" or "abnormality" provisions and the unique character of the relief they authorized, the Act established a specialized procedure for determination of such claims. With one limited exception, the taxpayer was required to pay the full tax without regard to its claim for relief under § 722 and then seek relief by a claim for refund (§ 722 (d)). Disallowance of the refund claim by the Commissioner was made reviewable upon a petition to the Tax Court (which normally has jurisdiction only over asserted deficiencies and not over claims for refund) (§ 732 (a)). In the interests of greater expertise and uniformity even within the Tax Court itself, a "special division" of at least three judges was to review the decisions of other divisions (typically, single judges) on § 722 and §721 (a) (2) (C) claims. The decisions of the Special Division, in turn, were not to be reviewed by the full Tax Court (§ 732 (d)). Finally, § 732 (c) provided:

> *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question

shall not be reviewed or redetermined by any court or agency except the Tax Court.

The sole issue in this case is whether the review sought by petitioner in the court of appeals was precluded by this provision.[4]

1. (a) The claims for relief involved here—based on an alleged temporary depression in the industry due to an over-expansion of capacity, a change in the ratio of petitioner's borrowed capital to its total capital, and a change in petitioner's capacity for production—were all grounded solely on § 722. The Tax Court found that some of the grounds for relief asserted were not supported by the evidence and denied relief on others because they were not presented to the Commissioner in the time and manner prescribed by the regulations under § 722 (d). Inasmuch as all of these questions, whether of fact or of law, related solely and exclusively to petitioner's claims for relief under § 722, it would seem indisputable that, as the court of appeals held, appellate review was barred by § 732 (c).[5]

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[4] The lack of any similarity between the wording of § 732 (c) and that of the Renegotiation Act of 1942 fully distinguishes the issue here from that in cases arising under that Act. The Renegotiation Act gave the Tax Court "exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits" from renegotiable contracts. § 403 (e) (1), 56 Stat. 245, as amended, 50 U. S. C. App. 1191 (e) (1). The Court held in *United States* v. *California Eastern Line*, 348 U. S. 351, that a determination whether a particular contract was "renegotiable" was not a determination of the "amount" of excessive profits and hence was reviewable.

[5] That that was the intended scope and effect of § 732 (c) was made unmistakably clear by the committee reports. H. Rep. No. 146, 77th Cong., 1st Sess., pp. 14–15; S. Rep. No. 75, 77th

Section 732 (c) has been consistently applied by at least six courts of appeals to bar appellate review of questions of the sort sought to be presented by petitioner.[6] That section has been held to be inapplicable, on the other hand, only in cases presenting questions of an entirely different kind: (1) questions deemed to turn on other provisions of law in addition to the relief provisions (so-called "combination questions");[7] (2)

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Cong., 1st Sess., pp. 15–16; H. Rep. No. 2333, 77th Cong., 2d Sess., p. 149; S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 206–207.

Since § 722 is a relief provision granted as a matter of legislative grace, there can be no question of the constitutionality of denying appellate review of the Tax Court's decision. See Pet. 3a; *James F. Waters, Inc.* v. *Commissioner*, 160 F. 2d 596 (C. A. 9), certiorari denied, 332 U. S. 767; *Standard Hosiery Mills* v. *Commissioner*, 249 F. 2d 469 (C. A. 4).

[6] *Crowell-Collier Pub. Co.* v. *Commissioner*, 1958 P-H Fed. Tax Rep. ¶58–5229 (C. A. 2, Oct. 7, 1958), petition for writ of certiorari pending, No. 500, this Term; *Corn Products Refining Co.* v. *Commissioner*, 215 F. 2d 513 (C. A. 2) (§ 721), certiorari denied on this question, 348 U. S. 911, affirmed on other issues, 350 U. S. 46; *George Kemp Real Estate Co.* v. *Commissioner*, 182 F. 2d 847 (C. A. 2), certiorari denied, 340 U. S. 852; *Colonial Amusement Co.* v. *Commissioner*, 173 F. 2d 568 (C. A. 3) (§ 711 (b) (1) (J) and (K)); *Standard Hosiery Mills* v. *Commissioner*, 249 F. 2d 469 (C. A. 4); *A. B. Frank Co.* v. *Commissioner*, 211 F. 2d 497 (C. A. 5); *Bradford Machine Tool Corp.* v. *Commissioner*, 1958 P-H Fed. Tax Rep. ¶58–5278 (C. A. 6, Oct. 29, 1958); *Patent Button Co.* v. *Commissioner*, 256 F. 2d 726 (C. A. 6); *Colorado Milling & El. Co.* v. *Commissioner*, 205 F. 2d 551 (C. A. 10) (§ 711 (b) (1)). See also *United States* v. *Koppers Co.*, 348 U. S. 254, 267–269 (dictum).

[7] *Stimson Mill Co.* v. *Commissioner*, 163 F. 2d 269 (C. A. 9), certiorari denied, 332 U. S. 824; *Dowd-Feder, Inc.* v. *Commissioner*, 173 F. 2d 673 (C. A. 6); *Dayton Rubber Co.* v. *Commissioner*, 249 F. 2d 2 (C. A. 6). See *Crowell-Collier Pub. Co.* v. *Commissioner*, *supra*; *Colorado Milling & El. Co.* v. *Commissioner*, *supra*, at p. 552; *George Kemp Real Estate Co.* v. *Commissioner*, *supra*, at p. 849.

questions going to the Tax Court's jurisdiction, such as the timeliness of the petition to the Tax Court;[8] (3) questions of res judicata;[9] and (4) questions whether issues independent of the right to relief (so-called "standard issues," such as the allowability of deductions) could be raised in a relief proceeding.[10]

(b) The sole divergence from the otherwise consistent pattern of decisions is the decision of the Ninth Circuit in *Helms Bakeries* v. *Commissioner*, 236 F. 2d 3, set forth in the petition at pp. 8a–17a. In that case the taxpayer sought review of the Tax Court's denial of two claims for relief under § 722: one, a claim that its base period earnings had been depressed by a price war, and the other, a claim that there had been an increase in its capacity for production and operation during and at the end of the base period. The court

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[8] *Arkansas Motor Coaches* v. *Commissioner*, 198 F. 2d 189 (C. A. 8); *Central Paper Co.* v. *Commissioner*, 199 F. 2d 902 (C. A. 6). Cf. *Packer Pub. Co.* v. *Commissioner*, 211 F. 2d 612 (C. A. 8), where the Tax Court had refused to pass on a § 711 (b) (1) (J) claim apparently on the ground that it had not been timely raised in the Tax Court proceedings.

[9] *George Kemp Real Estate Co.* v. *Commissioner*, 205 F. 2d 236 (C. A. 2). Since the rationale of that decision was that the question of collateral estoppel turned on provisions of law other than § 722, while the issues here turn solely on the findings of fact made for purposes of § 722 and on the regulations issued specifically under that section (as to adequacy and timeliness of the administrative claims for relief), petitioner's suggestion of a conflict (Pet. 12–13) seems unfounded.

[10] *Commissioner* v. *Blue Diamond Coal Co.*, 230 F. 2d 312 (C. A. 6); *Commissioner* v. *S. Frieder & Sons Co.*, 228 F. 2d 478 (C. A. 3); *Commissioner* v. *Seminole Mfg. Co.*, 233 F. 2d 395 (C. A. 5). See *Crowell-Collier Pub. Co.* v. *Commissioner*, *supra*.

of appeals, consistently with the above cases and its own prior decision in *James F. Waters, Inc.* v. *Commissioner*, 160 F. 2d 596, certiorari denied, 332 U. S. 767, dismissed the appeal as to the first claim on the ground that § 732 (c) barred review. At the same time, however, it undertook to review and reverse the Tax Court's decision on the second claim, holding that the Tax Court's ultimate finding was inconsistent with its evidentiary findings and also that it had failed to make a further finding deemed pertinent by the court of appeals. The distinction between the court of appeals' action on the two claims apparently turned on the fact that an "inconsistency" or lack of findings was alleged only as to the second claim. The opinion does not disclose, however, why § 732 (c) was thought to be any less effective to foreclose review of that alleged error than of any other."

After remand of the *Helms* case, the Tax Court made further findings and reaffirmed its original denial

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"Although the jurisdictional issue was fully argued, the court's only reference to the issue in ruling on the second claim was (Pet. 16a–17a):

> In view of the evidentiary findings of the Tax Court on this subject, its conclusion "lack of productive capacity was not a factor which to any appreciable extent limited petitioner's sales" appears to be arbitrary and contrary to its own findings.
>
> * * * * * *
>
> In light of the foregoing record in respect to relief sought by the petitioner under Section 722 (b) (4), we are not precluded from assuming jurisdiction because of the provisions of Section 732 (c).

of relief, 28 T. C. 79. The decision was again appealed to the Ninth Circuit. Counsel for the Government, both in brief and in oral argument, urged the court to reconsider and overrule its decision in *Helms* and, accordingly, to dismiss the second appeal for lack of jurisdiction. Oral argument was heard on July 11, 1958. The decision has not yet been announced.

(c) Petitioner in this case, seeking to bring itself within the apparent "exception" to nonreviewability adopted in the *Helms* case, alleged in the court of appeals that the Tax Court's ultimate findings were inconsistent with its evidentiary findings. Nevertheless, the court of appeals—like two others faced with similar claims based on the *Helms* case [12]—refused to review the findings for insufficiency or inconsistency and dismissed the appeal under § 732 (c). There is at the present time, therefore, a seemingly square conflict of decisions on this point among the courts of appeals.

The excess profits tax imposed by the 1940 Act was in effect only until December 31, 1945 (except for the effect of a one-year carryback), and the 1950 Excess Profits Tax Act (64 Stat. 1137, 26 U. S. C. (1952 ed.) 430 *et seq.*) contained no provisions comparable to §§ 722 and 732 (c). It is also true that, in numbers at least, the great bulk of the relief claims under the

[12] *Patent Button Co.* v. *Commissioner*, 256 F. 2d 726 (C. A. 6); *Crowell-Collier Pub. Co.* v. *Commissioner*, 1958 P-H Fed. Tax Rep. ¶ 58-5229 (C. A. 2, Oct. 7, 1958), petition for writ of certiorari pending, No. 500, this Term.

1940 Act have already been finally processed. Nevertheless, it must be admitted that the question is one of substantial and continuing importance.[13]

(d) For the foregoing reasons, the Commissioner would not oppose the granting of certiorari to resolve a subsisting conflict with the decision of the Ninth Circuit in the *Helms* case. As noted above, however, the *Helms* case is now back before the Ninth Circuit to review the additional findings made by the Tax Court on remand, and the court has been asked to overrule its earlier decision. Since that decision was reached without explanation or analysis of § 732 (c), is inconsistent with the Ninth Circuit's own prior decision in *James F. Waters, Inc.*, v. *Commissioner, supra,* and the decisions of at least six other courts of ap-

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[13] At the present time, there are approximately fifteen cases involving the so-called "relief" provisions in the courts of appeals.

In the Tax Court, according to the latest available statistics, as of October 31, 1958, there were pending at various stages 175 cases (asserting relief in an aggregate amount in excess of $524,000,000) involving substantive issues under § 722 alone—in addition to an undetermined number of cases involving issues as to timeliness or adequacy of claims for § 722 relief, and other related issues. Further, it is reasonably estimated that there are between 50 and 75 cases in the Tax Court involving relief under § 721 or § 711 (b) (1) (H–K) aggregating at least $100,000,000, and possibly several times that amount.

We are also informed that there is an undetermined number of claims for relief under §§ 722, 721, or parts of 711 (b) (1) pending at various administrative stages in the Internal Revenue Service.

peals, and has been rejected by the three courts of appeals in which similar claims of "inconsistent findings" have been made since the *Helms* decision, there is at least a reasonable prospect that the court will itself disavow its earlier decision and thus resolve the apparent conflict. Should that occur there would, we submit, be no further reason for this Court to review the decision in this case.

In view of the possibility of a resolution of the conflict, the Court may wish to defer action on the petition in this case until the decision of the Ninth Circuit on the second appeal in the *Helms* case (which, as indicated above, was argued on July 11, 1958) has been announced. If so, the Court may further deem it appropriate, in order to forestall any possibility of the Ninth Circuit's awaiting the action of this Court, to enter an order noting that the case has been continued pending the decision in the *Helms* case.

2. The other contentions of petitioner are without merit and present no conflict or other occasion for review by this Court.

(a) Petitioner contends that § 732 (c) of the 1939 Code was repealed by § 7851 (a) (6) (C) and (a) (7) of the 1954 Code, and that judicial review of Tax Court proceedings in excess profits tax cases is now governed solely by the provisions of § 7482 of the 1954 Code (which makes Tax Court decisions subject to the same review as decisions of district courts in civil actions tried without a jury) (Pet. 14–16). The contention was fully answered by the court below (Pet. 3a–5a) and has been expressly rejected by two other

courts of appeals,[14] while at least two more have, without question, applied § 732 (c) to appeals taken after the adoption of the 1954 Code.[15]

Section 7482 of the 1954 Code, the general provision governing review of Tax Court decisions, was a substantially verbatim re-enactment of the § 1141 of the 1939 Code. See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A434; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 614. The provision in § 7851 (a) (6) (C) of the 1954 Code (part of the general "effective date" provisions) that the general administrative provisions there enumerated (one being the chapter governing judicial proceedings) should apply to taxes imposed under the 1939 Code can be read to mean no more than that those provisions were to be effective immediately to supersede their *counterparts* in the 1939 Code. See H. Rep. No. 1337, *supra,* at A442–A443. Section 7851 (a) (7), in turn, was simply a catch-all provision to assure the repeal of any provisions of the 1939 Code that had not been specifically provided for. Since the Excess Profits Tax Act of 1940 had already been specifically repealed in its entirety by the Revenue Act of 1945 (59 Stat. 556) as to years subsequent to 1945, and remained in effect only for purposes of proceedings involving the prior years, there was no need to deal with the Act at all and the omission of any reference to § 732 (c) in the 1954 Code

[14] See note 12, *supra.* See also *George Kemp Real Estate Co.* v. *Commissioner*, 182 F. 2d 847 (C. A. 2), certiorari denied, 340 U. S. 852, rejecting a similar contention based upon an amendment to § 1141 of the 1939 Code.

[15] *Helms Bakeries* v. *Commissioner*, *supra*; *Standard Hosiery Mills* v. *Commissioner*, 249 F. 2d 469 (C. A. 4).

seems quite without significance. In all events, repeals by implication are not favored (see *e. g., Washington v. Miller,* 235 U. S. 422, 428), and it cannot reasonably be inferred that Congress, without comment, intended by these general provisions to abandon the specialized procedure it had carefully established to deal with the unique problems presented by excess profits tax relief claims. And the fact that there was pending contemporaneously with the enactment of the 1954 Code a special bill, which failed of passage, to alter the procedure in relief cases (Pet. 15) proves, if anything, that the general provisions of the Code were not intended to have that effect.

Moreover, petitioner's contention that § 732 of the 1939 Code was "repealed" by the 1954 Code, if valid, would have the anomalous result of depriving the Tax Court of its jurisdiction to review claims for relief under § 722. Such relief can be sought only by way of a claim for refund (see § 722 (d)), and it is only by reason of § 732 (a) that the Tax Court, whose jurisdiction is otherwise limited to deficiency proceedings, has jurisdiction over claims for refund in such cases. Thus, petitioner's argument requires attributing to Congress an intent not only to broaden appellate review but also to channel § 722 cases into the district courts rather than the Tax Court—in short, a complete turnabout from the specialized procedure deemed necessary by Congress when it specifically dealt with the matter.

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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 351

THE BROWN PAPER MILL COMPANY, INC., *Petitioner,*
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY TO MEMORANDUM FOR THE RESPONDENT

### I

The Memorandum for the Respondent states, with respect to the power of a Court of Appeals to review a § 722 case where the Tax Court made ultimate findings contrary to evidentiary findings, (p. 13):

> "There is at the present time, therefore, a seemingly square conflict of decisions on this point among the courts of appeals."

Respondent also admits that "The issue presented in this case is presented also on the petition for a writ of certiorari now pending before the Court in *Crowell-Collier Publishing Co.* v. *Commissioner,* No. 500, this Term."

The Respondent then asks this Court to delay action on the petition in the case at bar and in the *Crowell-Collier* case, because of his hope that the Ninth Circuit will reverse its prior decision in the *Helms Bakeries* case. Petitioner feels this request should not be granted because respondent's request is unreasonable.

Action by this Court should not be delayed because of possible action by a circuit court at some undetermined future date.

## II

The Memorandum for the Respondent brushes off the conflict with the Second Circuit in *George Kemp Real Estate Co.* v. *Commissioner,* 205 F. (2d) 236 (p. 11), despite the fact that:

(a) the only question before the Tax Court in the *Kemp* case was the claim that the taxpayer was entitled to § 722 relief. The Tax Court denied relief on the ground that a decision denying § 722 relief for a prior year estopped the taxpayer from a trial on the merits for later years. The Second Circuit accepted jurisdiction to review the Tax Court decision because the Tax Court based its decision on estoppel, so "The decision was not, in the language of the statute, 'necessary solely by reason of section * * * 722.'"

(b) The Fifth Circuit in the case at bar states "The question of reviewability may not be completely free

from doubt, and taxpayer's contention receives some oblique support from the second *Kemp* case, 205 F. (2d) 236, which is somewhat analogous."

## III

The Memorandum for the Respondent likewise brushes off the conflict with the express language of the 1954 Code (R. 15). It says that petitioner's argument, if valid, would have the anomalous result of depriving the Tax Court of its jurisdiction in § 722 cases. The Respondent overlooks advising the Court that § 7851 (b) (1)[1] of the 1954 Code specifically provides that existing rights and liabilities are not affected by the repeal of any provision of the 1939 Code. The Committee reports on the 1954 Code state:[2]

> "* * * all rights and liabilities under the 1939 Code will continue and may be enforced as if the repeal had not been made. For example, the liability for any tax imposed by the 1939 Code prior to its repeal will continue until paid notwithstanding such repeal."

The 1954 Code made procedural changes and states that the new judicial proceedings apply after the

[1] The subsection states:

"Existing rights and liabilities—the repeal of any provision of the Internal Revenue Code of 1939 shall not affect any act done or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause, before such repeal; but all rights and liabilities under such Code shall continue and may be enforced in the same manner, as if such repeal had not been made."

[2] Ways and Means Committee Report (p. 443) and the Finance Committee Report (p. 626).

effective date of the Code "notwithstanding any contrary provisions of such code." § 7851 (a) (6) (C).

**Conclusion**

Admitted conflict exists on one issue. We have demonstrated that conflict exists on other issues. The petition for a writ of certiorari should be granted to resolve these conflicts.

Respectfully submitted,

ROBERT ASH
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*Attorney for Petitioner*

December 2, 1958

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 351

THE BROWN PAPER MILL COMPANY, INC., *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

## PETITION FOR REHEARING OF DENIAL OF PETITION FOR A WRIT OF CERTIORARI

Comes now the above-named petitioner and petitions for a rehearing of denial of petition for a writ of certiorari. The reasons for this petition are:

### I

On December 29, 1958, after the denial of the petition for a writ of certiorari in the case at bar, a petition for a writ of certiorari to the Sixth Circuit was filed in No. 607; *The Bradford Machine Tool Company v. Commissioner of Internal Revenue.* The petition in the *Bradford* case alleges conflict with the Second Cir-

cuit in *Geo. Kemp Real Estate Co.* v. *Commissioner*, (1953) 205 F. (2d) 236, cert. den. 340 U.S. 852. In the case at bar, we likewise allege conflict with the *Kemp* case. In disposing of the case at bar, the Fifth Circuit stated (R. 7a):

> "The question of reviewability may not be completely free from doubt, and taxpayer's contention receives some oblique support from the second Kemp case, 205 F. (2d) 236, which is somewhat analogous."

## II

The petition for a writ of certiorari was denied in the case at bar before this Court acted upon the petition for a writ of certiorari in No. 500, *Crowell-Collier Publishing Co.* v. *Commissioner*, decided by the Second Circuit. In the *Crowell-Collier* case, as in the case at bar, the Commissioner admits direct conflict with the decision of the Ninth Circuit in *Helms Bakeries* v. *Commissioner* (1956), 236 F. (2d) 3. This Court has not, as yet, acted upon the petition in the *Crowell-Collier* case.

## III

In the case at bar and in No. 500, *Crowell-Collier Publishing Company*, the Commissioner states (Respondent's Memorandum, p. 14): "Nevertheless, it must be admitted that the question is one of substantial and continuing importance." Statistics are then cited to show that pending cases involve at least 624 million dollars "and possibly several times that amount."

## IV

From the foregoing and the numerous cases cited in the petitions for writs of certiorari in cases now pending, it is apparent that the question is an important

one and the conflict should be resolved by this Court. In order to accomplish this, the Court should accord the case at bar the same consideration as No. 500, *Crowell-Collier Publishing Company,* and No. 607, *The Bradford Machine Tool Company,* and this case should be disposed of in the light of the facts and conclusions reached in those cases.

ROBERT ASH
1921 Eye Street, N. W.
Washington 6, D. C.
*Attorney for Petitioner*

December 31, 1958

ROBERT ASH, counsel for the petitioner, states that the foregoing petition for rehearing is presented in good faith and not for delay and that the grounds for the motion are confined to intervening circumstances of substantial and controlling effect, or to other substantial grounds available to petitioner and not previously presented by petitioner.

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*Attorney for Petitioner*